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Yeoh Tai Chuan & Anor v Tan Chong Kean

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1415–08 OF 2014
BALIA YUSOF, HAMID SULTAN AND BADARIAH SAHAMID JJCA
11 MARCH 2016

C *Civil Procedure — Pleadings — Facts not pleaded — Confidential information — Whether there was cause of action in pleadings — Whether pleadings that do no contain cause of action an abuse of court process — Whether there was breach of confidentiality — Legal Profession Act 1976 s 126*

D The respondent was the shareholder of a company owning a piece of land which the developers agreed to develop through a company ('Bukit Gambier'). The respondent and his wife, who had two shares in Bukit Gambier, planned to take control of the shares in the company if it fails to complete the development of the land. The appellants were advised by their solicitor to
E execute a trust deed with the developer to allow the respondent to take over the management and control of Bukit Gambier. The trust deed was to be destroyed upon completion of the development. The development was eventually completed and the trust deed was supposedly destroyed. However, when a dispute on payment of fees arose, Bukit Gambier sued the appellants at the
F sessions court and sent a notice to the appellants to cease the disclosure of the trust deed, which was exhibited by the appellants. The respondent commenced an action against the appellants at the High Court for breach of confidentiality. The High Court judge ('the HCJ') prohibited the appellants from relying on and/or revealing the trust deed to the court. Hence, the present appeal.

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Held, allowing the appeal:

(1) There was no statement in the pleading which could sustain a cause of action under s 126 of the Legal Profession Act 1976 ('the LPA'). A claim
H for confidential information is different from the protection given to client and solicitors under s 126 of the LPA. The respondent's failure to plead the cause of action makes the suit fait accompli (see paras 3 & 11(b)).

(2) There was no finding by the HCJ that the respondent actually suffered
I damages. It was a wrong exercise of discretion for the trial court to order assessment of damages when there was no finding that the respondent suffered injury. It will also be a wrong exercise of discretion to order assessment of general damages only before the Registrar when parties have not requested the court to deal with liability only. Even if parties had

requested the court to deal with the issue of liability only, unless they intend to settle the matter amicably on the issue of quantum, the court was obliged to hear the issue as to liability as well as quantum (see para 11(c)).

[Bahasa Malaysia summary

Responden adalah pemegang saham syarikat yang memiliki sebidang tanah yang mana pemaju bersetuju untuk membangunkan melalui syarikat ('Bukit Gambier'). Responden dan isterinya, yang mempunyai dua saham dalam Bukit Gambier, merancang untuk mengambil kawalan saham-saham syarikat jika ia gagal untuk menyiapkan pembangunan tanah tersebut. Perayu-perayu dinasihati oleh peguamcara mereka untuk melaksanakan surat ikatan amanah dengan pemaju untuk membenarkan responden mengambil alih pengurusan dan kawalan Bukit Gambier. Surat ikatan amanah perlu dimusnahkan atas siapnya pembangunan tersebut. Pembangunan tersebut akhirnya siap dan surat ikatan amanah sepatutnya dimusnahkan. Walau bagaimanapun, apabila pertikaian pembayaran fi berbangkit, Bukit Gambier menyaman perayu-perayu di mahkamah sesyen dan menghantar notis kepada perayu-perayu untuk hentikan pengemukaan surat ikatan amanah, yang ditunjukkan oleh perayu-perayu. Responden memulakan tindakan terhadap perayu-perayu di Mahkamah Tinggi bagi kemungkiran kerahsian. Hakim Mahkamah Tinggi ('HMT') melarang perayu-perayu daripada bergantung atas dan/atau mendedahkan surat ikatan amanah kepada mahkamah. Maka, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Tidak terdapat pernyataan dalam pliding yang mungkin mengekalkan tindakan di bawah s 126 Akta Profesion Undang-Undang 1976 ('APU'). Tuntutan untuk maklumat rahsia adalah berbeza daripada perlindungan yang diberikan kepada anak guam dan penguamcara di bawah s 126 APU. Kegagalan responden untuk memplid kausa tindakan membuatkan guaman *fait accompli* (lihat perenggan 3 & 11(b)).

(2) Tidak terdapat dapatan oleh HMT bahawa responden sebenarnya menanggung kerugian. Adalah pelaksanaan budi bicara yang salah bagi mahkamah perbicaraan untuk memerintahkan penilaian ganti rugi apabila tidak terdapat dapatan bahawa responden mengalami kerugian. Ia juga adalah pelaksanaan budi bicara yang salah untuk memerintah penilaian ganti rugi am hanya di hadapan pendaftar apabila pihak-pihak tidak memohon mahkamah untuk berurusan dengan liabiliti sahaja. Jikapun pihak-pihak telah memohon mahkamah untuk berurusan dengan isu liabiliti sahaja, kecuali mereka berniat untuk menyelesaikan perkara secara persahabatan atas isu kuantum, mahkamah bertanggungjawab untuk mendengar isu tersebut terhadap liabiliti dan juga kuantum (lihat perenggan 11(c)).]

Notes

For cases on facts not pleaded, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7031–7041.

Cases referred to

Carindale Country Club Estate Pty Ltd v Astill and Others (1993) 115 ALR 112, FC (refd)

Charles Forte Investment Ltd v Amanda [1964] 1 Ch D 240, CA (refd)

China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1; [2014] 7 CLJ 644, CA (refd)

Taylor v Schindler 3 Bing NC 235, SC (refd)

Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297, HC (refd)

Legislation referred to

Evidence Act 1950 ss 114(g), 126

Appeal from: Civil Suit No 22–552 of 2009 (High Court, Pulau Pinang)

Muhammad Shafee Abdullah (CK Lew with him) (Shafee & Co) for the appellants.

K Kumaraendran (Raj Shankar, K Kumaran and Richard Huang with him) (Peter Huang & Richard) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants/defendants cum solicitors appeal against the decision of the learned High Court judge who had prohibited the defendants from relying on and/or revealing to court three trust deeds prepared by the defendants upon the respondent/plaintiff's instruction as solicitors for the respondent notwithstanding the fact that the plaintiff in a separate action relating to the defendants and the plaintiff had on his own motion revealed those documents in other suits.

PRELIMINARIES AND JURISPRUDENCE

[2] The plaintiff's case was anchored on the basis of breach of confidentiality without disclosing in the pleadings their confidential information which they intend to protect. This prima facie will appear to be a violent breach of pleading rules. However, the plaintiff in support of his case was anchoring his claim based on the solicitor-client privilege pursuant to s 126 of the Evidence Act 1950.

[3] We have perused the statement of claim several times but were not able to find any statement in the pleading which can sustain a cause of action under s 126 of the Evidence Act 1950. A claim for confidential information is different from the protection given to client and solicitors under s 126 of the Evidence Act 1950. The difference is not even like of an apple to an orange but the distinction is that of a rock and a fruit. Breach of confidential information can form a cause of action. However, we were doubtful whether s 126 of the Evidence Act 1950 can give rise to a cause of action. On the date of hearing, we found the submission was not satisfactory and directed parties to submit further, on this issue.

[4] At the outset we must say that the Evidence Act 1950 ('the EA 1950') is a procedural law related to trial in this country. As a general rule, a breach of any of the sections under the Evidence Act will not give rise to a cause of action per se. Section 126 is meant to be a protection given to the solicitors not to disclose information between solicitors and clients as stated in the section to third parties and not among themselves. It has nothing to do with confidential information or the definition or jurisprudence thereof.

[5] Section 126 of the EA 1950 reads as follows:

> 126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure —
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> (a) any such communication made in furtherance of any illegal purpose;
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> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
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> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

The phrase, 'No advocate shall at any time be permitted', clearly shows that a solicitor is not allowed to disclose any information relating to clients in the course of his professional employment without the client's consent. That is to say, a third party to the trial cannot force disclosure and/or the solicitor will be protected by the court to refuse disclosure. If not for the existence of s 126, solicitors may be liable for contempt if the courts order disclosure and the solicitors fail to do so or failure to disclose may trigger s 114(g) of the EA 1950 which relates to adverse inference.

[6] In the instant case, the endorsement to the writ as well as the pleading in our considered view does not show a cause of action per se to entitle the respondent to obtain the prayers stated in the statement of claim.

[7] The endorsement to the writ reads as follows:

Tuntutan plaintif terhadap defendan-defendan ialah untuk:

(1) Suatu injunksi untuk menghalang Defendan-defendan samada secara sendirinya atau menerusi pekerja atau ejennya atau salah satu daripada mereka dari melakukan perbuatan-perbuatan berikut atau salah satu daripadanya iaitu:

(a) menggunakan atau mendedahkan apa-apa maklumat sulit diberi dalam hubungan peguam-anakguam dan/atau dalam hubungan lazin pekerjaannya sebagai peguamcara kepada plaintif *(in the course of employment),* iaitu khasnya dalam kandungan

(i) TRUST DEED bertarikh 17–05–2004 antara CHOW YU TEK dan TAN CHONG KEAN;

(ii) TRUST DEED bertarikh 17–05–2004 antara CHEONG HO KUAN dan TAN CHONG KEAN;

(iii) TRUST DEED bertarikh 17–05–2004 antara LIM KIM HUAT dan TAN CHONG KEAN,

(selepas ini dirujuk sebagai Trust Deeds tersebut) kepada mana-mana pihak ketiga, dan/atau untuk digunakan di dalam presiding guaman Mahkamah Sesysn (2) Pulau Pinang Saman No 52–3367–2008;

(b) melakukan kemungkiran tugas fidusiari Professional dengan Plaintif berkenaan dengan Trust Deeds tersebut.

(c) Menyerahkan segala dokumen dan material dalam milikan, di bawah kuasa, simpanan dan kawalan defendan-defendan di mana penggunaannya atau pendedahannya akan melanggari injunksi-injunksi yang tersebut di atas atau salah satu daripadanya.

(d) Suatu penyiasatan untuk kerugian akibat kemungkiran maklumat sulit atau, atas pilihan plaintif, suatu penilaian keuntungan yang diperolehi oleh defendan-defendan yang berpunca dari kemungkiran tersebut.
Suatu perintah untuk pembayaran segala jumlah yang patut dibayar kepada plaintif setelah penyiasatan atau penilaian tersebut dibuat berserta dengan faedah.
Gantirugi am dan khas yang dialami oleh Plaintiff bagi kemungkiran-kemungkiran berikut:

(i) Kemungkiran keyakinan *(breach of confidence):*

(ii) Salah penggunaan maklumat-maklumat sulit dan/atau *Conversion*

(misuse of confidential information and/or conversion);

(iii) Kemungkiran kewajipan berjaga-jaga *(breach of duty of care).*

(e) Gantirugi Teladan sebanyak RM1,000,000;

(f) Faedah ke atas gantirugi yang diawadkan sebanyak 8% setahun dari 05–08–2009 sehingga penyelesaian penuh;

(g) Kos; dan

(h) Lain-lain relif-relif yang dianggap suaimanfaat oleh Mahkamah Yang Mulia ini.

BRIEF FACTS

[8] The plaintiff was a shareholder of Pan Palace Holdings Sdn Bhd which owned the land in a place called Sungai Dua. Three persons by the name of Chow Yu Teck ('CYT'), Lim Kim Huat ('LKH') and Cheong Ho Kuan ('CHK') had agreed to develop the land through a company called Bukit Gambier Market Point Sdn Bhd ('Bukit Gambier'). The plaintiff and his wife also initially had two shares in Bukit Gambier. That is to say, the plaintiff had some control in Bukit Gambier, but he was not satisfied and thought that Bukit Gambier may not complete the development, and in the event they do not, he wanted to take control of the shares in Bukit Gambier to complete the development of the land. For this purpose, the first defendant advised the plaintiff to get a trust deed done with CYT, LKH and CHK. The trust deed essentially was to allow the plaintiff to take over the management and control of Bukit Gambier. It was a condition that upon the completion of the development, the trust deed was to be destroyed.

[9] The development was completed in 2007 and the trust deed was said to be destroyed by the signatories save for the copies with the defendants as solicitors.

[10] The defendants had purchased a unit from Bukit Gambier and there was some balance of payment to be paid as alleged by the parties and the defendants also said that there was a balance in respect of fees from the plaintiff which we do not wish to elaborate, save to say:

(a) Bukit Gambier sued the defendants in sessions court Suit No 52–3367 of 2008. Since the plaintiff, CYT, LKH and CHK had some nexus to the defendants defence of payment, etc. the defendants filed a third party notice against the plaintiff;

(b) at this stage the plaintiff's solicitor in that suit sent a notice to the defendants to cease to disclose confidential information, privileged information and the trust deeds by a letter dated 22 July 2009. The said

letter reads as follows:

M/s TC Yeoh & Co, Dated: 22-07-2009

Advocates & Solicitors,

1st Floor, 306-H,

Jalan Burma,

10350 Penang.

Dear Sirs,

Re: Third Party Notice

We act for Mr Tan Chong Kean of No 8-B, Jalan Hargreaves, 11600 Penang.

We are instructed to give you notice that our client has engaged you on or about 17-05-2004 in the preparation and witnessing of a Trust Deed.

TAKE NOTICE that our client has not given its consent or approval nor waived any rights to its disclosure by you as solicitors.

You are hereby required to strictly uphold solicitor's-client's priviledge under the provisions of the Legal Profession Act, 1976.

Yours faithfully,

PETER HUANG & RICHARD

sgd

Richard Huang

Advocate & Solicitor

cc Mr Tan Chong Kean,

No 8B, Hargreaves Road,

11600 Penang.

(c) despite the notice, the defendants have exhibited the three trust deeds;

(d) in consequence, the plaintiff had filed this suit alleging in the statement of claim and summarised by the learned trial judge as follows:

[22] The plaintiff raised the following issues in the statement of claim:

[i] that by disclosing the three trust deeds all dated 17 May 2004 in the third party proceedings before the sessions court, the defendants had disclosed privileged information without the consent of the plaintiff;

[ii] that the defendants had acted in breach of solicitor-client privilege;

[iii] that the defendants had acted in breach of their fiduciary duty to the plaintiff;

[iv] that the defendants had acted in breach of confidence;

[v] the defendants had acted in breach of their of care.

(e) it is important to note that the plaintiff in a civil suit magistrates court vide Summons No 72–3437 of 2009 had by himself disclosed the existence of the trust deeds.

[11] We have read the memorandum of appeal, the record of appeal and the able submission of the parties. After giving much consideration to the submission of the learned counsel for the defendants, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) we note that the plaintiff and the defendants were not parties to the trust deed and in consequence there could not be a cause of action for breach of confidential information per se as per the pleadings. Support for the proposition is found in a number of cases (see *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; *Carindale Country Club Estate Pty Ltd v Astill and Others* (1993) 115 ALR 112). In *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644, the corum consisting of Aziah bt Ali JCA, Hamid Sultan bin Abu Backer JCA and Umi Kalthum bt Abdul Majid JCA, on confidential information and pleadings, on the facts of the case, inter alia, had this to say:

> [19] What is important to note in the above cl 7 is that it relates to all 'information'. Information has a specific jurisprudence and meaning and in consequence it will not relate to all letters and correspondence which do not have the character of information. The learned trial judge in her judgment appears not to have taken note of the underlying jurisprudence relating to 'information' and the distinction in relation to correspondence, and the rules of pleading. If the complaint is that information was released, whether that information complained of will fall within the jurisprudence of confidential information is another matter. Further, if the 'information' is not identified by the plaintiff in the pleadings it will be difficult for the first defendant to rely on the contractual defence and/or exception stated in cl 7.2. In consequence the 'fairness rule' in litigation process will be breached and the failure to do so will also attract s 114(g) of the Evidence Act 1950.
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> [20] Clause 1.1 of the memorandum defines proposal as well as the person who will submit it and reads as follows:
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> 'Proposal' means the proposal for the construction and implementation of the project to be submitted by CRBC pursuant to cl 5 of this agreement which shall set forth in detail, the scope of works, alignment, design parameters, construction programme, costs, financing plan and any maintenance and operation of the project if so required.
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> [21] It must be noted that the proposal here has a specific meaning. A part or fraction of what is stated in cl 1.1 will not amount to proposal. And that part necessarily need not trigger cl 7 per se. A part of the proposal cannot be

assumed to be the property of the plaintiff until it is established under the law that it falls under cl 7.

[22] The learned judge in her judgment says 'upon perusing cl 1.1, cl 4.6 and cl 7.1 of the agreement, it is clear that the information contained in the proposal including the concept paper is protected and confidential'. In our considered view taking into consideration the factual matrix of the case it is difficult to even fathom, how the proposal including the concept paper will become 'Confidential Information' which phrase has jurisprudence as well as sacrosanct effect if parties have not specifically stated so in the 'memorandum'. Though there is a right under the 'memorandum' to say that the proposal should not be utilised for purpose other than stated in the agreement it does not specifically cover 'information', etc, which is the intellectual property of the first defendant itself. That is to say the proposal may be by joint efforts but that does not mean intellectual property of each individual cannot be disclosed. The distinction is like apple and orange and need no elaboration. From the evidence and submission it is clear that what had been circulated to second and third defendants were not the complete documents which were submitted to the Government of Malaysia which comes within the definition of proposal. In addition, the respondent was fully aware of the release of the relevant documents to the second and third defendants and all with good reasons. Further, for purpose of assessment of damages the nature of the information and its breach and its effect on the plaintiff is an essential criteria to assess quantum. Technical breaches per se may not entitle damages save to say nominal damages only (see *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528).

[23] The learned counsel for the first defendant's argument that the information released does not breach the obligation of confidence and does not fall within the parameters of confidential information as envisaged by the parties in cl 7.1 of the 'memorandum' has merits. Very importantly in the instant case the identification of the 'confidential information' or for that matter 'information' has not been met (see *John Zink Co Ltd v Wilkinson 3* [1973] FSR 1). On the issue of confidential information there are a number of authorities to support the first defendant's argument. To name a few are as follows:

(a) In *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 where it was stated:

> In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.
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> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the *Saltman* case on p 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances

importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communication it. I must briefly examine each of these requirements in turn.

(b) In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 stands for the proposition that confidential information may be released in certain circumstances and very importantly where the disclosure is made by the express or implied consent of the customer.

(b) in our considered view, the learned High Court judge misdirected herself in failing to appreciate the long line of authorities relating to 'confidential information' as well as pleading rules. The plaintiff's failure to plead the cause of action with the particulars on the face of record makes the suit fait accompli;

(c) on the issue whether solicitor-client privilege under s 126 of the EA 1950 will apply for the plaintiff to anchor a cause of action, we were not appraised with a comprehensive submission on this issue despite the fact we have given parties time to submit. In our considered view, s 126 of the EA 1950 will not entitle the plaintiff to anchor a cause of action. However, if a solicitor breached solicitor-client privileges without the consent of the clients, it can be a subject matter of complaint to the advocates' disciplinary board. The breach, if sufficiently serious, may result in the solicitors being struck out from the roll of advocate and solicitor. We do not wish to deal with the issue whether there can be a cause of action against a solicitor in the manner pleaded by the plaintiff for breach of solicitor-client privileges, save to say:

(i) in the instant case, it involves a dispute between clients and solicitors and/or has nexus. In consequence, s 126 of the EA 1950 will not be applicable. Support for the proposition is found in a number of cases and academic writings. Learned authors of *Sarkar's Law of Evidence*, (15th Ed) Vol 2 at p 1876 had this to say:

> Litigation Between Attorney and Client — It has frequently been held that the rule as to privileged communications of attorneys does not apply when litigation arises between attorney and client, and when their communications are relevant to the issue (*Naive v Baird* 12 Ind 318); and if it is claimed that the attorney has an interest in the pending litigation, for instance that his fee is contingent on the result, he may be required to state such fact, and the communications with his client relating thereto (*Eastman v Kelly* 1 NYS 866). And when an attorney, though acting professionally, receives at his client's request a deed of land and conveys it to a third party, no consideration being paid, he may be compelled to disclose the facts (*Hager v Shindler,* 29 California 47; Jones, s 754).

(ii) for a client to succeed in an action based on improper disclosure, he

must prove that he actually suffered injury. Pure disclosure itself does not entitle the clients to seek damages as per the old cases (see *Taylor v Schindler* 3 Bing NC 235). In the instant case, there was no finding by the learned trial judge that the plaintiff had actually suffered damages which the plaintiff has quantified damages as RM100m which on the face of record as well as the facts will appear to be an abuse of process of court. The trial court on such facts at the case management stage itself should have inquired to determine whether indeed it was an abuse of the court process, if so, it must give the litigant notice to amend, failing which the suit should be struck out. Abuse of process is not a matter that the court should entertain (see *Charles Forte Investment Ltd v Amanda* [1964] 1 Ch D 240);

(iii) it is a wrong exercise of discretion for the trial court to order assessment of damages in the instant case when there was no finding that the plaintiff suffered injury. In addition, it will be a wrong exercise of discretion to order assessment of general damages only before the Registrar when parties have not requested the court to deal with liability only. Even if parties had requested the court to deal with the issue of liability only, unless they intend to settle the matter amicably on the issue of quantum, the court is obliged to hear the issue as to liability as well as quantum. The issue of liability as well as quantum is part and parcel of the obligation of trial court.

[12] For reasons stated above, we take the view that this is a fit and proper case to allow the appeal and set aside the order of the High Court with a direction that:

(a) the plaintiff to return to Messrs Shafee & Co, three stamped copies of the trust deeds all respectively dated 17 May 2004; surrendered to Messrs Peter Huang & Richard; as stakeholders pursuant to Penang High Court Conditional Consent Stay Order dated 1 October 2014 and;

(b) the plaintiff to return to Messrs Shafee & Co, the exemplary damages in the sum of RM50,000 together with the costs of RM30,000 paid to Messrs Peter Huang & Richard, as stakeholders; pursuant to Penang High Court Conditional Consent Stay Order dated 1 October 2014.

[13] The respondent to pay costs here and below in the sum of RM60,000 to the appellant, subject to allocator. Deposit to be refunded.

We hereby order so.

Appeal allowed.

Reported by Afiq Mohamad

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